Elite Marine Service, Ltd. d/b/a Big Apple Launch *and* Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO. Cases 29–CA–14981, 29–CA–15453, and 29–CA–15551

March 19, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On November 4, 1991, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions. The General Counsel filed a brief in support of the judge's decision and an answering brief to the Respondent's exceptions. The Respondent filed a reply to the answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Elite Marine Service, Ltd. d/b/a Big Apple Launch, Staten Island, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

''(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> ''All regular part-time and full-time crew members employed by the Employer at its facility located between Piers 17 and 18, Staten Island, New York, excluding office clericals, guards and supervisors as defined in the Act.''

2. Substitute the attached notice[3] for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

With respect to the chronology of events in 1989 underlying the 8(a)(5) violation, the judge correctly found that Louis Kyriakidis became a part owner of the Respondent on February 1, that the Union filed a representation petition on April 7 (the record shows that it was at 12:29 p.m.), that Kyriakidis divested himself of his ownership interest on May 3, and that the Union withdrew its petition on June 16. He erred, however, in finding that Kyriakidis, on behalf of the Respondent, signed the initial collective-bargaining agreement (the Memorandum of Agreement introduced into evidence) when the Union withdrew its petition. That finding seems to have been based on the judge's misreading Morrissey's testimony. Morrissey, the sole witness to testify to the events on which the alleged refusal to bargain rests, testified that the agreement was signed by Kyriakidis the afternoon of April 7, several hours after Morrissey informed Kyriakidis that he had just filed the petition. Morrissey also testified that he prepared the Memorandum of Agreement later that same afternoon. The Memorandum of Agreement supports Morrissey's averment that it was signed on April 7, as that is the date written in next to the typewritten word ''DATE''—albeit the agreement also contains a written entry of ''the 6 day of April'' as the date on which it states it was ''made'' (an apparent inadvertent mistake in dating given Morrissey's undisputed testimony). Accordingly, we find that the agreement was signed by Kyriakidis on April 7, a time when he still retained his one-third interest in the Respondent.

We also correct the judge's error in finding that the Union filed its unfair labor practice charge on the refusal-to-bargain issue after September 10. The record shows that the charge was filed on July 9. This error does not affect our decision.

No exceptions were filed to the judge's findings of violations of Sec. 8(a)(3) and several independent violations of Sec. 8(a)(1).

[2] The recommended Order is modified to include the Board's standard language to describe the Respondent's affirmative bargaining obligation.

[3] The notice is amended to conform to the Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to close our business to discourage support for Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO.

WE WILL NOT tell our employees, in effect, that we will hire only employees opposed to the Union.

WE WILL NOT unlawfully interrogate any of our employees as to their support for the Union.

WE WILL NOT discharge any employee in order to discourage membership in the Union.

WE WILL NOT fail to bargain collectively with the Union by refusing to honor its requests to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate unit:

> All regular part-time and full-time crew members employed by us at our facility located between Piers 17 and 18, Staten Island, New York, excluding office clericals, guards and supervisors as defined in the Act.

WE WILL offer Joseph Fitzgerald, James Behan, and John McGowan immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and WE WILL make them whole for any losses of earnings and other benefits they may have suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any references to the unlawful actions against Fitzgerald, Behan, and McGowan and notify them that this has been done and that their discharges will not be used against them in any way.

ELITE MARINE SERVICE, LTD. D/B/A BIG APPLE LAUNCH

Matthew T. Miklave, Esq., for the General Counsel.
John G. Capetanakis, Esq., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

James F. Morton, Administrative Law Judge. The complaint alleges that Elite Marine Service, Ltd. d/b/a Big Apple Launch (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by having refused to negotiate a renewal collective-bargaining agreement with Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO (the Union), by having discharged three employees to discourage support for the Union, and by having unlawfully interrogated and otherwise coerced employees respecting their support for the Union.

The Respondent, in its answer, asserts that it is not engaged in interstate commerce, that the Union is not the collective-bargaining agent of its employees, and that it has not engaged in any unfair labor practice.

The hearing opened on July 15, 1991. It continued on July 17 and closed on September 16, 1991.[1] Upon the entire record, including my observation of the demeanor of the witnesses and after considering the brief filed by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation of the State of New York. Its principal place of business is located between piers 17 and 18 on Staten Island, New York. It operates launches to transport crews between those piers and oil tankers and other vessels moored in the New York harbor. Those crews are employed by other companies on vessels which transport products and materials to locations outside the State of New York, including other States of the United States. The Respondent also carries, to and from these vessels, shipping agents, agents from the customs and immigration services, oil gaugers, and others.

In *Open Taxi Lot Operation*, 240 NLRB 808 (1979), the Board found that the employer there, in operating a taxi dispatch system at the San Francisco airport, provided a service which was an essential link in interstate commerce. On that basis, the Board asserted jurisdiction. The launch services provided by the Respondent for crews of oceangoing vessels and for other personnel having business aboard those vessels are at least equally an essential link in interstate commerce as the taxi services provided at the San Francisco airport. On that basis, and as the Respondent derives gross revenues which exceed $50,000 annually, the Board should assert its jurisdiction in this case.

As noted above, the parties reached a stipulation respecting certain commerce facts. That stipulation discloses that the Respondent, in its operations annually, meets the Board's indirect outflow standard for the assertion of jurisdiction, as set out in *Frank Arrow Rock Materials*, 284 NLRB 1 (1987), and in *Siemons Mailing Services*, 122 NLRB 81 (1958). For that further reason, the Board should assert jurisdiction.

II. LABOR ORGANIZATION

The uncontroverted testimony establishes that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Refusal to Bargain*

On August 11, 1987, the Union received a certification of representative in Case 29–RC–6843 as the exclusive representative, for the purposes of collective bargaining, for a unit comprised of all regular part-time and full-time crewmembers employed by Seaquest Marine Service, Inc. and Big Apple Launch Service, Ltd., at its facility located between piers 17 and 18, Staten Island, New York, excluding office clericals, guards, and supervisors as defined in the Act.

On February 1, 1989, three individuals—namely, Ourania Golfinopoulos, Louis Kyriakidis, and John Hatzalou, purchased the business from Seaquest Marine Service, Inc. and Big Apple Launch Service, Inc. and transferred those assets to the Respondent in exchange for its capital stock.

The Union's assistant business manager at that time, James Morrissey, heard of the sale and visited the Staten Island facility where he spoke with Louis Kyriakidis, also known as Louis Kay. Kay told Morrissey that he would recognize the

[1] It had been adjourned indefinitely on July 17. In the interval between then and September 16, the parties reached a stipulation as to certain facts relevant to the issue of the Board's jurisdiction. That stipulation was forwarded with a letter dated September 16 which recited my order closing the hearing. That letter and the stipulation are in evidence as Jt. Exh. 1.

Union but would not sign a contract because he and his partners needed time ''to get on their feet.''

Morrissey spoke with Kay several times afterwards, apparently without making any headway towards getting an agreement signed. Morrissey concluded that Kay was stalling. The Union then, on April 7, 1989, filed a petition in Case 29–RC–7183 to represent the Respondent's crewmembers.

On May 3, 1989, Kay sold his stock in the Respondent to Gerasimos Vlachos. It appears, however, that Kay continued to function as an official of the Respondent. Morrissey testified that the Union withdrew its petition in Case 19–RC–7183 on June 16, 1989, when Kay signed a collective-bargaining agreement with it.[2] That contract expired on June 30, 1990.

On April 1, 1990, the Union wrote the Respondent that the collective-bargaining agreement would terminate as of June 30, 1990, and it requested that that arrangements be made to negotiate a renewal contract. By letter of June 6, 1990, the Union reiterated its request. When no response was received to either letter, Morrissey telephoned the Staten Island facility and was told to call ''Mrs. G,'' whose full name is Ourania Golfinopoulos. Mrs. Golfinopoulos' signature appears on one of the papers comprising the formal documents in this case. She lists herself there as the president of the Respondent. She also signed the stipulation, discussed above, in her capacity as president. Morrissey called her. She told him then that the Respondent was losing money, that she had nothing against the Union, that the employees ''were good men,'' and that she would have ''Jerry'' Vlachos call him to negotiate a contract. In that discussion, Mrs. Golfinopoulos also referred to Louis Kay as her partner.

Morrissey, however, never heard from Vlachos. He wrote Mrs. Golfinopoulos on September 10, 1990, to tell her that Vlachos never called him. When he received no response to that letter, the Union filed the first of the unfair labor practice charges in this case.

The evidence adduced by the General Counsel demonstrates that the Union was certified in 1987 as the exclusive collective-bargaining representative of the unit of crewmembers employed at the launch facility located between piers 17 and 18 in Staten Island by Sea Quest Marine and Big Apple Launch. The Respondent took over that business in 1989. Louis Kay, whom the Respondent's president later identified as one of her partners, signed a collective-bargaining agreement, on behalf of the Respondent, with the Union, covering the employees in that unit. The evidence also discloses that the Union made repeated efforts to meet with the Respondent in order to negotiate the terms of a renewal agreement and that the Respondent has not communicated with the Union towards setting up a time and place for negotiations. The evidence thus establishes prima facie that the Respondent has failed to fulfill its obligation to bargain collectively with the Union. The Respondent has offered no plausible grounds to explain its failure to honor the Union's request that a meeting be arranged in order to negotiate a renewal contract. In the absence of any valid reason, I find that the Respondent has failed to bargain collectively, with the Union, as alleged in the complaint.

[2] For some inexplicable reason, the contract indicates that it was executed on April 6, 1989—the day before the Union filed its petition in Case 29–RC–7183. Obviously, the April 6 date is in error as Morrissey's testimony shows that the Union had filed its petition because it had not been successful in getting a contract signed.

B. *Alleged Coercive Statements*

1. Conversations between Fousteris and Omar

The complaint in these cases alleges that the Respondent, by statements made by its manager, Demetrios Fousteris, interfered with the rights of its employees to be represented by the Union.

Fousteris began working for the Respondent on September 18, 1990, managing the Staten Island facility. The General Counsel offered the testimony of Habib Omar as to two conversations he had with Fousteris.

Omar testified as follows. He worked on a part-time basis for the Respondent during the months that he is in school, and full time during the summer months. He divided his duties between work as a deckhand and office work. In September 1990, Fousteris talked to him about unions, saying that it was not possible ''to organize the company'' and that the three captains who belonged to the Union will vote for the Union. Fousteris identified those three as Joseph Fitzgerald, John McGowan, and James Behan. Fousteris also said then that if the Union came in he would hire several captains to vote against the Union. In November 1990, Fousteris asked Omar if he knew anybody who wants to work for the Respondent and admonished him to ''make sure they don't belong to the [U]nion.''

Omar testified further that, in December 1990, Fousteris handed him a sheet, which had the Respondent's letterhead on it, and which had the following typed on it.

> My name is . . . . and I am a subcontractor doing jobs for Elite Marine Services, Ltd., Trading as Big Apple Launch Service, Ltd. That I execute the work using my own tools, materials and equipment and I pay my own taxes, including but notlimited to the social security taxes.
>
> That ELITE MARINE SERVICES Ltd., Trading as BIG APPLE LAUNCH SERVICE Ltd., do not exercise an supervision for the execution of the work or the hours of work and I make my own work schedule. Therefore, I am not considered an employee of the above named firm. I get paid according to the work performed by me and I pay all my taxes including Social Security, Federal income tax, State income tax and City income tax. If needed, I carry my workers compensation and disability insurance and I am aware that I do not have such coverage from the company.

Fousteris told him then that if he did not sign it in 2 weeks he would have to leave his job. Two weeks later Omar asked Fousteris if he still wanted that letter signed. Fousteris told him to forget about it.

Fousteris answered in the negative to a series of questions put to him by the Respondent's counsel as to whether he had any discussions with Omar, including any relating to the Union. In fact, Fousteris sometimes appeared to be answering ''No'' before a question was asked or completed.

I credit Omar's account over Fousteris' summary denials.

Based on the credited evidence, I find merit to the complaint allegation that the Respondent, by Fousteris, interfered

with employees' Section 7 rights by having indicated to Omar that it would hire only employees who would be opposed to the Union.

2. Conversations between Fousteris and Fitzgerald

Joseph Fitzgerald has worked in the maritime industry since 1959. He was referred from the Union's hiring hall, to the Respondent and began working for the Respondent in April 1990 as a launch captain. Fitzgerald testified that, during a discussion he had with Fousteris in his office in late November or early December 1990, the subject of the Union came up. According to Fitzgerald, Fousteris began talking about the employees voting for or against the Union and that Fitzgerald told Fousteris that there was no need for any such election as the Union had an agreement with the Respondent. A week later, Fitzgerald testified, Fousteris asked him how another launch operator, McGowan, would vote if there was an election for the Union and that he replied that he did not know. Fitzgerald further related that Fousteris asked him how he would vote and he answered that he would vote for the Union. In a later discussion, also as reflected in Fitzgerald's account, Fousteris referred to the Union, and also to a Board agent who apparently was conducting an investigation, in scatological terms.

Fousteris testified that he never said anything against the Union but did not controvert, in any material manner, the testimony of Fitzgerald respecting the discussions they had concerning unions. I credit Fitzgerald's account.

Based on the credited evidence, I find that the Respondent coerced its employees respecting their rights under Section 7 of the Act by Fousteris' having unlawfully interrogated Fitzgerald as to his and McGowan's sympathies for the Union. See *Williamson Memorial Hospital*, 284 NLRB 37, 38–39 (1987).

3. Alleged unlawful threat to close

James Behan, employed by the Respondent on December 30, 1990, as a launch captain also upon his referral from the Union's hiring hall, testified as follows. On that day, Fousteris gave him a copy of the subcontractor agreement, set out above. A week later, Fousteris talked to him about that form. During the discussion, Behan referred to the form in a sarcastic manner and started to ask Fousteris as to whether the form had anything to do with the Union. Fousteris interrupted and told him angrily that if ''the people want the [U]nion . . . and vote yes, [h]e will close up the business.'' Fousteris went on to say, in vulgar language, that he would open up a new business while Behan and the others would be out in the ''street.''

Fousteris, in the course of his testimony, did not allude to that conversation in any substantive way.

I credit Behan's vivid account and, accordingly, I find that the Respondent, by Fousteris, threatened its employees that it would close its operations if they supported the Union.

C. *Alleged Unlawful Discharges*

Behan reported for work on Sunday, January 9, 1991, and found that another employee was assigned in his place. He asked Fousteris for an explanation and was told that his hours were being cut and that he would be called back when he was needed.

Fitzgerald was told by Fousteris in a telephone conversation on January 13, 1991, that it had been decided at a company meeting that he was not to report for work, that he was ''terminated.''

McGowan received a call also from Fousteris on January 13, to the same effect.

All three were told by Fousteris that they were ''good men.''

The Respondent later hired several launch operators but has not recalled Fitzgerald, McGowan, or Behan.

The evidence in this case discloses that these three launch captains were longtime members of the Union, that the Respondent was aware of and had animus as to their support for the Union, that it discharged them in the context of evading its obligation to bargain collectively with the Union and despite the fact that it acknowledged that they were good workers, and that it hired replacements for them, after having indicated to one employee, Omar, that it would hire employees who would be opposed to the Union. The General Counsel has established a clear prima facie case that these three launch captains were discharged because they supported the Union. Under *Wright Line*, 251 NLRB 1083 (1980), the burden then shifted to the Respondent to prove that it would, absent the Union, still have terminated their employment. There is no probative evidence in the record which the Respondent can cite to show that it has met this burden. I thus find that the Respondent discharged these three captains because they were members of, and supported, the Union.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having

(a) Threatened its employees with closing its business to discourage support for the Union.

(b) Telling employees in effect that it will hire only employees opposed to the Union.

(c) Unlawfully interrogated its employees as to their support for the Union.

(d) Engaged in conduct described in paragraphs 4 and 5 below.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act by having discharged its employees Joseph Fitzgerald, James Behan, and John McGowan because of their support of the Union.

5. The Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act by failing to honor the Union's request that it bargain collectively with the Union as the exclusive representative for such purposes of a unit comprised of the crewmembers employed by the Respondent.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged three employees, I find it necessary to order it to offer them reinstatement to their former jobs or, if they no longer exist, to substantially equivalent jobs, without prejudice to their seniority or their other rights and privileges and make each of them whole for any losses of earnings or other compensation that they suffered as a result of the unlawful action against them. Backpay shall be computed in accordance with the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Elite Marine Service, Ltd. d/b/a Big Apple Launch, Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with closing its business in order to discourage support for Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO (the Union).

(b) Telling its employees in effect that it will hire only employees opposed to the Union.

(c) Unlawfully interrogating its employees as to their support for the Union.

(d) Discharging employees in order to discourage membership in the Union.

(e) Failing to bargain collectively with the Union as the exclusive representative of the unit comprised of its crewmembers by failing to honor the Union's request to bargain.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Joseph Fitzgerald, James Behan, and John McGowan immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their lost earnings in the manner set forth in the remedy section above.

(b) Remove from its files all references to the discharge of these employees and notify them in writing that this has been done and that their discharges will not be used against them in any way.

(c) Notify the Union in writing that it will meet, and bargain collectively, with the Union as the exclusive representative of the Respondent's crewmembers.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Staten Island, New York branch copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''